4209

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN (now BRANSFORD), and WELDON M. BAILEY,
Plaintiffs in Error.

vs.

ALTO MINES COMPANY, a corporation,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

BEN C. HILL,
Attorney for Defendant in Error.

Filed this.......................................day of May, 1924.

....
Clerk of the United States Circuit Court of Appeals, Ninth Circuit.

ACME-TUCSON

MAY 2 - 1924
F. D. MONCKTON

INDEX

Page

Supplemental Statement of Case 1

Argument—

I. Taxability of Baca Float No. 3........ 2
II. Collateral Attack on Judgment........ 9
III. Sheriff's Deed Conveying Fee Simple Title........ 24
IV. As to the Interest of the Heirs of Daisy Belle Bouldin 32
V. Answers to Various Minor Contentions........ 46

Conclusion........ 48

TABLE OF CASES CITED

Alta Co. vs. Benson, 2 Ariz. 362, 370, 16 Pac. 565, 145 U. S. 428 .... 4- 6
Allen vs. Evans, 7 Ariz. 359; 64 Pac. 412........ 9
Allen vs. McCabe, 93 Mo. 136........ 22
Allen vs. Ray, 10 S. W. 153; 96 Mo. 542........ 22-32
American Express Co. vs. Mullins, 212 U. S. 311........ 16
Arizona Copper Company, Ltd. vs. State, 15 Ariz. 920; 137 Pac. 417 10
Atkinson vs. Dixon, 1 S. W. 13; 86 Mo. 464........ 9
Boyd vs. Ellis, 18 S. W. 29; 107 Mo. 394........ 22
Briscoe vs. Rudolph, 221 U. S. 547........ 18-20
Bryan vs. Kales, 3 Ariz. 423; 31 Pac. 517........ 33
Bryan vs. Pinney, 3 Ariz. 412........ 45
Burcham vs. Terry, 18 S. W. 458; 55 Ark. 398........6-23-25
Carr vs. Townsend, 63 Pa. 202........ 35-38
Carroll vs. Safford, 3 How. 441........ 6
Charley vs. Kelley, 25 S. W. 571; 120 Mo. 134........ 22
Chicago Theological Seminary vs. Gage, 12 Fed. 398........ 20-23
Christianson vs. Kings County, 239 U. S. 356........ 7
Clegg vs. Greenwood Cemetery, 107 U. S. 466........ 44
Collins vs. Mitchell, 5 Fla. 364........ 35
Colt vs. Colt, 111 U. S. 566........ 17
Cooper vs. Reynolds, 10 Wall. 308........ 11
Cowell vs. Gray, 85 Mo. 169........ 32
Cyc. 17, p. 1049........ 48
Cyc. 17, p. 1269........ 48
Cyc. 23, pp. 1071, 1072........ 16
Cyc. 24, p. 36........ 42
Cyc. 24, p. 36........ 48
Dalton vs. Renteria, 2 Ariz. 275; 15 Pac. 38........ 45
Davis vs. Guinea, 104 U. S. 386........ 34-41
Delinquent Tax Act of 1903, Appendix........ 50
Dickerson vs. Colgrove, 100 U. S. 578........ 44
Donohue vs. El Paso & S. W. R. R. Co., 214 U. S. 499........ 45
Drexel vs. Barney, 122 U. S. 241........ 44
Earhart vs. Powers, 17 Ariz. 55; 148 Pac. 286........ 25
Elder vs. Wood, 208 U. S. 226........ 25
Ency. U. S. Sup. Ct. Rep. 7, p. 739........ 11
Erwin vs. Lowry, 7 How. 172........ 44
Evers vs. Watson, 156 U. S. 527........ 16
Florentine vs. Barton, 2 Wall. 210........ 34
Forbes vs. Gracey, 94 U. S. 762........ 25-28

Frost vs. Spitley, 121 U. S. 552 6
George vs. Tate, 102 U. S. 564 44
Gibbs vs. Southern, 22 S. W. 713; 116 Mo. 204 22
Gill vs. U. S., 160 U. S. 426 44
Gregg vs. Von Puhl, 1 Wall. 274 44
Griffith vs. Bogert, 59 U. S. 158 47
Grignon vs. Astor, 2 How. 319 15-16
Henley vs. Donohue, 110 U. S. 1 15
Harvey vs. Tyler, 2 Wall. 342 13-15
Henrietta M. & M. Co. vs. Gardner, 173 U. S. 123 10
Hensen vs. Peter, 164 Pac. 512 48
Hewes vs. Miller, 98 Atl. 776; 254 Pa. 957 23
Hewitt vs. Great Western Co., 230 Fed. 394 42
Hibben vs. Smith, 191 U. S. 310 33
Hill vs. Sherwood, 8 S. W. 781; 96 Mo. 125 22
Hudenoohl vs. Liberty Hill Co., 29 Pac. 1025 48
Jeffrey vs. Hursh, 7 N. W. 221; 45 Mich. 59 9
Jetter vs. Hewitt, 22 How. 352 33-39
Jones vs. Driskell, 7 S. W. 111; 94 Mo. 190 22
Kirk vs. Hamilton, 102 U. S. 68 44
Landex vs. Mercantile Bank, 186 U. S. 458 19
Lane vs. Watts (234 U. S. 525; 235 U. S. 17) 3- 4
Last Chance Mining Co. vs. Tyler M. Co., 157 U. S. 683 15-17
Leibes vs. Steffy, 4 Ariz. 10; 77 Pac. 617 6-25
Lewis vs. Whitton, 20 S. W. 617 47
Lumber Co. vs. Hotel Co., 94 Cal. 217; 29 Pac. 627 48
Mayo vs. Ah Loy, 32 Cal. 477; 91 A. M. D. E. C. 595 23
Mayo vs. Foley, 40 Cal. 281 23
Mason vs. Bennett, 52 Fed. 343 48
McMillan vs. Hickman, — W. Va. —; 14 S. E. 227 39
Murray vs. Weigle, 112 Pa. 159; 11 Ata. 781 35-39
Norman vs. Eastburn, 130 S. W. 276 47
Northern Pacific Railway Company vs. Thompson, 253 Fed. 178 7
New Orleans vs. Gaines, 138 U. S. 595 34
New Orleans vs. Warner, 175 U. S. 120 19
N. P. R. R. Co. vs. Patterson, 154 U. S. 130 6-25
Ontario Land Co. vs. Wilfong, 223 U. S. 543 20
Ontario Land Co. vs. Yordy, 212 U. S. 152 20-31-45
Otis vs. DeBoer, 116 Ind. 531; 19 N. E. 317 35-39
Payne vs. Lott, 90 Mo. 676 32
Peck vs. Jenness, 7 How. 612 15
Pickering vs. Lomax, 120 Ill. 260; 11 N. E. 175 9
Porterfield vs. Clark, 2 How. 76 45
Remington vs. Lenthicum, 14 Pet. 84 47
Reynolds vs. Stockton, 140 U. S. 254 15
Roberts vs. S. P. R. R. Co., 158 U. S. 1 45
Robinson vs. Gaar, 6 Calif. 274 7
R. C. L. 7, pp. 1021, 1030 12
R. C. L. 15, 669 17
R. C. L. 15, p. 311 16
Santiago vs. Nogueras, 214 U. S. 260 13
Schmidt vs. Niemeyer, 13 S. W. 405; 100 Mo. 207 22
S. F. R. Co. vs. U. S., 168 U. S. 1 15
Simmons vs. Burlington Ry. Co., 169 U. S. 278 43
Simmons vs. Saul, 138 U. S. 439 15-18-34
Skillman vs. Clardy, 165 S. W. 1050; 256 Mo. 297 22
Skillman vs. Manwaring, 73 S. W. 447; 173 Mo. 21 22
South Missouri Co. vs. Carroll, 164 S. W. 599; 255 Mo. 357 22
Southern P. R. Co. vs. U. S., 168 U. S. 1, 5 17
State of Arizona vs. Watts, 21 Ariz. 93; 185 Pac. 934 5-14

State vs. Hunter, 11 S. W. 756; 72 Mo. 386 ... 22
Taylor vs. Snow, 47 Tex. 462; 26 Am. Rep. 311 ... 35-39
Territory vs. Copper Queen Consolidated Mining Co., 13 Ariz. 198; 108 Pac. 960; 233 U. S. 87 ... 10-11
Thompson vs. Tolsie, 2 Pet. 157 ... 34
Thompson vs. Whitman, 18 Wall. 457 ... 34
Trail vs. Snoufler, 6 Md. 308 ... 35-37
Tube City Co. vs. Otterson, 16 Ariz. 305; 146 Pac. 203 ... 12-15-17
U. S. vs. California & O. Land Co., 192 U. S. 365 ... 16-18
U. S. vs. Hogg, 112 Fed. 909 ... 48
U. S. Trust Co. vs. Mercantile Trust Co., 88 Fed. 140 ... 19
U. S. vs. Moran, 218 U. S. 493 ... 17
Vance vs. Corrigan, 78 Mo. 94 ... 32
Van Fleet on Collateral Attack, §587, 602, 603 ... 35-36-37-38-39
Voorhees vs. U. G. Bank, 10 Pet. 447 ... 42
Warder vs. Tainter, 4 Watts. (Pa.) 270 ... 35-39
Warlain vs. New Orleans, 177 U. S. 390 ... 23
Warren vs. Oregon & W. R. R. Co., 176 Fed. 336 ... 20
Waterhouse vs. Cousins, 40 M.e 333 ... 35-39
Watt vs. Brockover, 35 W. Va. 323; 13 S. E. 1007 ... 35-39
Webster vs. Woolbridge, 29 Fed. Cases 17340 ... 47
Werelin vs. New Orleans, 177 U. S. 390 ... 18
Wheaton vs. Sexton, 4 Wheat. 502 ... 47
White vs. Crow, 110 U. S. 183 ... 18-47
Wilcher vs. Robertson, 78 Va. 602 ... 35-38
Wilfong vs. Ontario Land Co., 171 Fed. 51 ... 20-24
Wisconsin Co. vs. Price County, 133 U. S. 476 ... 6
Wise vs. Watts, 239 Fed. 207 ... 3- 5
Witherspoon vs. Duncan, 4 Wall. 210 ... 6-12-25
Yaple vs. Titus, 41 Pa. 195 ... 35

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES E. BOULDIN, DAVID W. BOULDIN, HELEN L. BOULDIN (now BRANSFORD), and WELDON M. BAILEY,
Plaintiffs in Error,

vs.

ALTO MINES COMPANY, a corporation,
Defendnt in Error.

BRIEF OF DEFENDANT IN ERROR

SUPPLEMENTAL STATEMENT OF CASE

This was an action in ejectment tried before the District Court on November 4th and 5th, 1919. The defendant, Alto Mines Company, answered. Its right to possession was based upon a tax deed to the property involved. The main question in the case was whether or not the lands embraced within Baca Float No. 3 were taxable by the State of Arizona prior to December 14, 1914. At the time of the trial, the same question was before the Supreme Court of the State of

Arizona, on appeal, in a case in which the plaintiffs in error herein were parties. On December 16, 1919, the Supreme Court of Arizona held that the lands within the Float were taxable prior to 1914. Thereafter, and on November 21, 1921, the Supreme Court of the United States denied a Writ of Error to the Supreme Court of Arizona for want of jurisdiction. The judgment for the defendant, Alto Mines Company, was entered in February, 1923; Judge Sawtelle stating in his memorandum opinion that he felt bound by the decision of the Arizona Supreme Court, "the same being a construction of an Arizona Statute by the Arizona Supreme Court," (Tr. p. 221).

ARGUMENT

I

Taxability

NOT ONLY IS THE TAXABILITY OF THE ALTO PROPERTY RES ADJUDICATA, BUT THERE WAS A CLEAR RIGHT TO TAX FOR THE YEARS SHOWN IN THE JUDGMENT, AND THE SUPREME COURT OF ARIZONA HAS RECENTLY SO HELD. THE SALE UNDER EXECUTION OF THE TAX JUDGMENT OF THE INTERESTS OF THE PLAINTIFFS HEREIN WAS JUST AS GOOD AS THEIR OWN DEED WOULD HAVE BEEN, AS THEY HAD AN UNDIVESTIBLE LEGAL TITLE TO A TRACT OF LAND, THEN DEFINITELY DEFINED AND SEGREGATED.

In *Lane vs. Watts* (234 U. S. 525; 235 U. S. 17) the Supreme Court held that legal title to the Float had been divested from the United States on April 9, 1864, that segregation by survey was accomplished by the Contzen survey (234 U. S. 525, 540, 541; 235 U. S. 17, 20); and the filing (in reality, recognition) of the plat thereof, *as a muniment* (evidence) *of title,* was decreed, as the right to such muniment was expressly given by the Act of 1860 (12 Stat. 71, §6) making the grant, and the Commissioner's order of April 9, 1864, approving the location.

> "In so deciding the Court evidently proceeded upon the view that the specific description contained in the application of June 17, 1863, identified the land applied for and that the approval of that selection by the Commissioner of the General Land Office attached the title granted by Congress to that specific tract, and that no patent was required." (*Wise vs. Watts,* 239 Fed. 207, 213.)

Prior to the filing in 1908 of the Bill in *Lane vs. Watts* (as the pleadings therein show and the record at bar discloses), the Contzen survey had been made in 1905, approved by the Surveyor-General of Arizona in 1906, and "examined and found correct" by the Commissioner of the General Land Office (*Lane vs. Watts,* 234 U. S. 525, 534), (Tr. p. 199), or as the Circuit Court of Appeals said in the title case (*Wise vs. Watts,* 239 Fed. 207, 211), "Duly approved and thereafter filed

in the General Land Office." At all times thereafter, the plat of survey was actually on file in the Land Department in Washington.

The contention that the plat of survey was not "approved and filed" until December, 1914, is absolutely erroneous. (Pltf. Brief p. 7.) The decree in *Lane vs. Watts* simply directed the filing or recognition of the plat of survey as a *muniment of title.*

Baca Float No. 3 ceased to be a part of the public domain on April 9, 1864, (*Alta Co. vs. Benson,* 2 Ariz. 362, 370, 16 Pac. 565, 568; affirmed in 145 U. S. 428); otherwise *Lane vs. Watts* could not have been maintained.

The legal segregation of the grant from the public domain took place on April 9, 1864, and the Bill in *Lane vs. Watts* so averred (234 U. S. 525, 535). The physical segregation or monumenting of boundaries was completed and approved either in 1905 or 1906, or at any rate prior to the filing of the Bill in *Lane vs. Watts.*

At any rate, the filing of the plat of survey *as a muniment* in 1914 gave no new title; it simply supplied the *evidentiary incident,* given by the statute and order making the grant, of a title which passed over fifty years prior thereto, a title which for over fifty years had been sold, conveyed, mortgaged, partitioned, and even sold under execution as to one of the Bouldins.

If the plaintiffs' voluntary deed of June 29, 1914, would have been good, the Sheriff's deed is certainly good, whatever can be conveyed voluntarily can be conveyed *in invitum* by judicial process.

When the statutes of limitation on adverse possession commenced to run is another story, as the technical muniment may or may not have been essential thereto, under the strict technicalities surrounding a recovery in ejectment.

The plaintiffs herein, and their predecessors in title, had a legal title to a definite tract with exact metes and bounds, which could be and was conveyed, at all times since April 9, 1864. Their right to the particular land *in metes and bounds* was complete and nothing that they did do (in their numerous attempts at re-location), and nothing they did not do, could in any way impair or improve the title which passed on April 9, 1864 (*Wise vs. Watts*, 239 Fed. 207). They were not excluded by law from taking possession. A legal title imports a right of possession.

So far as it may be of interest as an academic proposition we may state that the entire Float was taxable, prior to 1910, and the Supreme Court of Arizona has recently so held. The opinion of the Court in that case (*State of Arizona vs. Watts,* 21 Ariz. 93, 185 Pac. 934) contains some inaccuracies in its statements of facts but the opinion clearly holds that the interest of the plaintiff herein was so taxable, at least upon the "claim to" the Float.

Bearing in mind the exact facts, the passing of legal title in 1864, the function and effect of the survey as a mere physical monumenting of the metes and bounds, and the decreed filing or recognition of the plat of survey as *evidence* of title or boundaries, a reference to the following cases will demonstrate the soundness of our views on taxability, even though the title to the Float was in dispute with the Land Department, and the filing of the plat of survey as a muniment of title had not been effected, as the land was no longer "property of the United States:"

N. P. R. R. Co. vs. Patterson, 154 U. S. 130, 131, 132, 134. (Land taxable even when Land Department denied title had passed to owner and when owner claimed land had "never been segregated from the public lands or identified, and the boundaries of the specific lands granted had never been ascertained or determined."—page 131.)

Witherspoon vs. Duncan, 4 Wall. 210.

Leibes vs. Steffy, 4 Ariz. 10; 77 Pac. 617 (land taxable when full equitable title has passed even to unsurveyed land.)

Burcham vs. Terry, 18 S. W. 458; 55 Ark. 398.

Frost vs. Spitley, 121 U. S. 552, 556.

Carroll vs. Safford, 3 How. 441.

Wisconsin Co. vs. Price County, 133 U. S. 476.

Alta Co. vs. Benson, 2 Ariz. 362, 370; 16 Pac. 565, 568; affirmed, 145 U. S. 428.

Christianson vs. Kings County, 239 U. S. 356, 364.
Robinson vs. Gaar, 6 Calif. 274. (Validity of grant contested, and owner not in possession.)

The case of *Northern Pacific Railway Company vs. Thompson,* 253 Fed. 178, is not in point for the plaintiffs:

1. That case was a direct attack on the tax, while in the case at bar the attack is collateral after a judgment of taxability by an Arizona court of competent jurisdiction.

2. Survey is ordinarily essental to pass title to a railroad land grant, as such grants are generally of alternate sections and there can be no section until after a survey makes and defines sections. In the case at bar, the grant was of a specific tract whose boundaries were fixed in 1863 and 1864, and simply monumented in 1905. The case in question is specifically limited in the opinion to a railroad land grant.

3. The Baca Float tax case in the Arizona Supreme Court, as to which a Writ of Error was dismissed by the United States Supreme Court, determines the taxability of the Float for the year or years in question. There is therefore no reason to resort to analogy: there is direct authority as well as a direct adjudication.

4. The case in question holds that the Commissioner's approval of the plat of survey is sufficient to make even a railroad grant taxable, and that filing of the plat locally thereafter is not essential to taxability.

The Commissioner's approval at bar took place before 1908. So the case is an authority against the plaintiffs.

The statement that "No patents appear to be in existence" (Pltffs. Bf. p. 2), finds no support in the record. The complaint and judgment declared them "patented mines"—private property, and such of them as are involved herein are in fact private property and have been since April 9, 1864.

On page 26 of plaintiff's brief, the question is asked, what possible notice could B have that his own property was being assessed. This could be followed by another question.

Why were plaintiffs herein made parties to the action and why did their attorney attend the sale? The plat of the Contzen survey, as familiar to them and their attorneys as the alphabet, showed the Alto property within the Float; and there is no evidence herein that they did not know such was the case. Locating a mining claim on private property is a nullity; but a foreclosure of the land, in which the real owner and the locator are made defendants, bars their rights. And the tax judgment so declared.

THE DEFENDANT HEREIN HAD A CLEAR RIGHT TO PURCHASE AT THE TAX SALE FOR ITS OWN ACCOUNT.

That was absolutely permissible, particularly as the title was in bitter dispute, and the defendant herein had only a quitclaim title *dated after the commencement of the tax action,* and made by a grantor (Santa Cruz Development Co.) which has since been adjudicated to have had no title to convey *and which was never in possession.*

Allen vs. Evans, 7 Ariz. 359; 64 Pac. 412.
Atkinson vs. Dixon, 1 S. W. 13; 86 Mo. 464.
Pickering vs. Lomax, 120 Ill. 260; 11 N. E. 175.
Jeffrey vs. Hursh, 7 N. W. 221; 45 Mich. 59.

There is no evidence herein as to the possession of the property. The allegations in our amended answer pleading adverse possession were abandoned at the trial and related only to our inurement to whatever title the *defendant mining corporations in the tax suit* acquired by adverse possession. By purchasing at the tax sale we took all the rights of *all* the defendants.

II

Collateral Attack

This was an action at law in ejectment and the primary question involved on the trial was the effect of a sale for taxes of the Alto group of mines, located within Baca Float No. 3, under a tax judgment recovered by the State of Arizona against the plaintiffs and their predecessors in title, in an action for delinquent

taxes under the Arizona Delinquent Tax Act of 1903 (Laws of 1903 pp. 162 to 173) which, throughout the action, sale and conveyance, was the law of the case. (Arizona Civil Code of 1913, Sec. 4940.)

The Court will note that the sale was not summary but judicial. If summary, the defendant herein would be required to prove a valid tax and a regular sale. But the sale was judicial (Tr. p. 117), in pursuance to the judgment of a court of general jurisdiction, in an action with all known claimants of record as parties; and such a judgment and sale, under all the authorities, both State and Federal, is entitled to the same immunity from collateral attack as all other judgments and sales had in a court of general jurisdiction.

The Arizona Act of 1903 is taken practically word for word from Missouri (*Arizona Copper Company Ltd. vs. State,* 15 Ariz. 9, 20, 137 Pac. 417; *Territory vs. Copper Queen Consolidated Mining Co.*, 13 Ariz. 198, 215, 108 Pac. 960, affirmed in 233 U. S. 87) and the Arizona courts are bound by the construction placed upon that statute by the highest appellate courts of Missouri prior to 1903 (*Territory vs. Copper Queen Consolidated Mining Co.,* 13 Ariz. 198, 215, 108 Pac. 960; affirmed, 233 U. S. 87), and such is the rule in the Federal courts. (*Arizona vs. Copper Queen Consolidated Mining Co.,* 233 U. S. 87; *Henrietta M. & M. Co. vs. Gardner,* 173 U. S. 123, 130; U. S. R. S. §721, U. S. Comp. Stat. 1916 and 1918 Eds. §1538). The

Act of 1903 gave a right of action, *quasi in rem,* in favor of the State, in a court of general jurisdiction. (*Territory vs. Copper Queen Consolidated Mining Co.,* 13 Ariz. 198, 215, 108 Pac. 960; affirmed, 233 U. S. 87.) The validity of the tax is now *res adjuticata*, and the effect of the judgment and sale, when attacked collaterally, is in no wise dependent upon proof of the validity of the tax or the freedom of the proceedings from errors or irregularities.

Of course, in the tax action, the State cannot recover without showing a valid tax, but a judgment for the tax is just as binding as any other judgment and fully adjudicates the subject matter.

THE SUPERIOR COURT OF SANTA CRUZ COUNTY, ARIZONA, HAD FULL JURISDICTION IN THE ALTO TAX SUIT.

As applied to judicial tribunals, jurisdiction is the power to hear and determine the cause (7 Ency. U. S. Sup. Ct. Rep. 739).

Jurisdiction over the subject matter means jurisdiction over the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organized the Court and is to be sought for in the general nature of its powers or in the authority specially conferred (*Cooper vs. Reynolds,* 10 Wall. 308, 316). Such jurisdiction was conferred by the Arizona Laws of 1903, pages 162 to 173.

Jurisdiction over the subject matter does not mean simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which that particular case belongs (7 R. C. L. 1029, 1030). "It is the power to deal with the general abstract question * * * and to determine whether or not they (the facts) are sufficient to invoke the exercise of that power" and "to enter upon the inquiry." (*Tube City Co. vs. Otterson,* 16 Ariz. 305, 311; 146 Pac. 203; a case well worth reading on the subject of jurisdiction.

Obviously the sovereign state of Arizona may confer on one of its courts of general jurisdiction the power to determine as against all the world, except the United States itself, whether or not taxes are owing or lawfully levied on any land within the borders of that state (*Witherspoon vs. Duncan,* 4 Wall. 210).

The power to adjudicate taxability necessarily carries with it the power to enforce that adjudication in the manner provided by the law conferring upon the court the power to make the adjudication.

The primary repository of the general judicial power of the state of Arizona is its Superior Court. It is a court of general jurisdiction, both civil and criminal, at law and in equity (*Tube City Mining Co. vs. Otterson,* 16 Ariz. 305, 311; 146 Pac. 203). Its predecessor

court of territorial days was of equal power and dignity.

When in 1903, Arizona, by a new statute gave a new jurisdiction to one of its courts of general jurisdiction, to be exercised judicially and according to the general principles of the common law or chancery, the proceedings of that court under that statute were the proceedings of a court of general jurisdiction, to whose proceedings all presumptions of regularity are due. (*Harvey vs. Tyler,* 2 Wall. 342).

What plaintiffs herein assert to be a lack of jurisdiction was at most an erroneous decision on a matter of law in a case wherein they did not deign to present their defense (Tr. p. 87). Obviously an erroneous decision on a matter of law in rendering a judgment, or even a disregard of statutory provisions, does not deprive a court of jurisdiction of the cause (*Santiago vs. Nogueras,* 214 U. S. 260).

Anything that would defeat the cause of action is a matter of defense which must be pleaded and proved, and the failure of the plaintiffs herein to do so did not divest the jurisdiction of the court or impair its judgment.

If the Superior Court of Arizona did not have jurisdiction to determine the taxability of the land in the Alto tax suit, what court did have such jurisdiction?

A very practical confirmation of the *jurisdiction* of the Superior Court in the Alto tax suit is the fact that

the plaintiffs herein litigated therein, and in the Supreme Court of Arizona, the taxability of the Float for the years 1913 to 1916. (*State vs. Watts, supra*) (see 21 Ariz. 93, for names of parties to that suit). They are bound by the judgment in that case, being parties, and yet seek to have this court overrule that decision as if on appeal. The right of further appeal from that decision was denied by the Supreme Court of the United States in dismissing the Writ of Error to the Supreme Court of Arizona on November 21, 1921, for *want of jurisdiction.* 66 L. Ed. p. 399.

Jurisdiction of the subject matter means of the "class of cases;" the Superior Court certainly had *jurisdiction* to determine its taxability. The Supreme Court of Arizona has held the Float taxable before 1914, and even the plaintiffs herein did not question the jurisdiction in that case. Furthermore, the Float has been private land since April 9, 1864. Of the cases cited, *Jourdan vs. Barrett* (4 How. 169) and *Gibson vs. Choteau* (13 Wall. 92) relate to statute prior to passage of legal title; *Wilcox vs. McConnell* (13 Pet. 496) has nothing to do with the effect of a judgment; *Hackall vs. C. & O. Canal Co.* (94 U. S. 308) was a summary tax sale and so were the two Wisconsin cases. A summary tax sale is open to defenses; an Arizona tax sale after judgment is not. *Ritchie vs. Sayers* (100 Fed. 520) was a sale of attached property on constructive service without filing the statutory forthcoming bond. And there is a differ-

ence between the statutory power of the court to render a judgment, and the propriety of the judgment in a given case, especially when the propriety is based on a matter of defense that is not pleaded.

THE JUDGMENT OF A STATE COURT, EVEN THOUGH RENDERED ON DEFAULT, CANNOT BE ATTACKED COLLATERALLY EXCEPT FOR AN ABSOLUTE AND APPARENT LACK OF JURISDICTION.

Judgments of a State court when offered elsewhere "are not re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and the parties" (*Hanley vs. Donohue,* 110 U. S. 1, 4; *Simmons vs. Saul,* 138 U. S. 439, 459). To the proceedings of such a court all presumptions of regularity are due (*Harvey vs Tyler,* 2 Wall. 342).

Where jurisdiction depends on the facts, such a judgment is conclusive against collateral attack (*Grignon vs. Astor,* 2 How. 319; *Tube City Co. vs. Otterson,* 16 Ariz. 305, 146 Pac. 203).

A judgment is conclusive as to everything it determines on matters in issue (*S. F. R. Co vs. U. S.*, 168 U. S. 1; Last Chance Mining Co. vs. Tyler M. Co., 157 U. S. 683; *Reynolds vs. Stockton,* 140 U. S. 254; *Peck vs. Jenness,* 7 How. 612).

"A judgment is conclusive as to all the *media concludendi* (*U. S. vs. California & O. Land Co.,* 182 U. S. 365), and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based on a mistake of law" (*American Express Co. vs. Mullins,* 212 U. S. 311).

A judgment cannot be impeached collaterally on account of any irregularity or insufficiency of the cause of action or taint of illegality (23 Cyc. 1071, 1072).

An attack on a judgment for want of jurisdiction of subject matter is collateral when founded on extraneous evidence (15 R. C. L. 311). To hold a judgment void collaterally, it is necessary to show, beyond any controversy, that upon the record the court could not have had jurisdiction (*Evers vs. Watson,* 156 U. S. 527, 532, 533).

As was said in the famous case of *Grignon vs. Astor* (2 How. 319):

> "A judgment of a court of general jurisdiction is absolute verity, to contradict which there can be no averment or evidence"; such a court can decide on its own jurisdiction. "A judgment in its nature concludes the subject on which it is rendered and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive in this court as it is in other courts. It puts an end to all in-

quiry into the fact by deciding it." A purchaser under its judgment is protected, no matter how erroneous it may have been or how palpably the court disregarded or misconstrued the law. The principle is of more universal application in proceedings *in rem* after a final decree by a court of competent jurisdiction.

A judgment of a court within its jurisdiction is not void though wrong, and cannot be attacked collaterally, as the remedy is by appeal (*Tube City Co. vs. Otterson,* 16 Ariz. 306, 146 Pac. 203).

A judgment cannot be attacked collaterally even when the court errs in holding that a case has been made, either under its inherent power as a court of equity or its statutory authority (*U. S. vs. Moran,* 218 U. S. 493).

"A judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest" (*Last Chance Mining Co. vs. Tyler Mining Company,* 157 U. S. 683, 691; *Southern P. R. Co. vs. U. S.,* 168 U. S. 1, 5). And it is so held in Arizona (*Tube City Co. vs. Otterson,* 16 Ariz. 305, 146 Pac. 203); and generally elsewhere (15 R. C. L., 669).

A judgment cannot be attacked collaterally even for failure to appoint a *guardian ad litem* for an infant defendant (*Colt vs. Colt,* 111 U. S. 566), or for failure to call a jury as required by law (*Briscoe vs. Rudolph,*

221 U. S. 547), or if rendered before time for answer expires (*White vs. Crow,* 110 U. S. 183).

Estoppel by judgment applies even against the United States when it seeks to attain the same result in another suit on a different ground or in another capacity (*U. S. vs. California & O. Land Co.*, 192 U. S. 365).

Estoppel by judgment applies to a municipality even though it subsequently discovers that land which was the subject of a prior adjudication of sale against it had been dedicated to the public use and was not salable (*Werelin vs. New Orleans,* 177 U. S. 390).

Considering the great number and variety of courts in this country, as well as the division of judicial jurisdiction among state and national courts, comity of necessity must be observed to the highest degree, in the interest of a sound public policy and to preserve in our people a reverend respect for all courts and their judgments.

In *Simmons vs. Saul,* 138 U. S. 439, 454, it was said:

> "The entry of a decree is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; if none is given from the final decree, it is conclusive on all whom it concerns. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind; if the court which rendered it has, in the exercise of jurisdiction, disregarded or

misconstrued or disobeyed the plain provisions of the law which gave it the power to hear and determine the case before it, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error."

THE FEDERAL COURTS RECOGNIZE NO DIFFERENCE, AS REGARDS IMMUNITY FROM COLLATERAL ATTACK, BETWEEN A JUDGMENT IN A TAX SUIT AND A JUDGMENT ON ANY OTHER CAUSE OF ACTION.

"A judgment for taxes does not differ from any other in respect to its conclusiveness" (*New Orleans vs. Warner*, 175 U. S. 120, 141).

Res adjudicata applies in tax cases (*Landex vs. Mercantile Bank,* 186 U. S. 458, 476).

A tax judgment is conclusive as to the validity and legality of the tax, and cannot be attacked or questioned collaterally (*U. S. Trust Co. vs. Mercantile Trust Co.*, 88 Fed. 140, 157, 158; U. S. C. C. A., 9th Circuit).

A tax judgment, even though obtained on service by publication, and a sale thereunder, cannot be attacked collaterally even for serious irregularities in the assessment and the proceedings and an apparent lack of any notice of sale; so held where the sale was of lots and blocks by number alone, when there were no such num-

bers in fact on the recorded map, and the official tax plat had marked the lots "reserved," the sale being held good as to the "reserved" lots, as they were held to be what was intended to be sold; and a statute, similar to §89 of the Arizona Tax Law of 1903 or §4939 of the Arizona Civil Code of 1913, creating presumptions of regularity, etc., in favor of a tax deed under a tax judgment, is valid.

Wilfong vs. Ontario Land Co., 171 Fed. 51; U. S. C. C. A., 9th Circuit.

Ontario Land Co. vs. Wilfong, 223 U. S. 543, 553, 559.

Ontario Land Co. vs. Yordy, 212 U. S. 152.

Warren vs. Oregon & W. R. R. Co., 176 Fed. 336, 337 (U. S. C. C. A., 9th Circuit).

A tax decree is immune from collateral attack, even though a jury required by statute was not called (*Briscoe vs. Rudolph,* 221 U. S. 547).

A judgment in a tax action is conclusive against collateral attack even for an illegal tax, as the owner had the right to have his day in court to contest its validity in the action in which the tax judgment was rendered (*Chicago Theological Seminary vs. Gage,* 12 Fed. 398, 401).

IT IS THE SETTLED LAW OF ARIZONA AND MISSOURI, THAT A TAX JUDGMENT HAS THE SAME IMMUNITY AS ANY OTHER JUDGMENT FROM COLLATERAL ATTACK AND THAT ERRORS OR IRREGULARITIES, NO MATTER HOW NUMEROUS OR GROSS, DO NOT AFFECT IT, AND THAT IT ADJUDICATES TAXABILITY AND A VALID TAX.

As heretofore stated, the construction placed upon the Missouri statute, prior to 1903, by the courts of last resort in that state, was adopted and forms a part of the Arizona statute.

The courts of Missouri have held almost innumerable times that such a judgment, even on constructive service, is good collaterally, no matter how numerous or gross the errors or irregularities therein may have been, or that it was for an erroneous assessment, or if the land was not actually assessed at all, or that the taxes were paid before the suit; and that the validity of the tax is conclusively established by the judgment, that the court in rendering it was acting within its general jurisdiction, that the existence of a valid assessment and of taxability is adjudicated by the judgment; that the recitals of the judgment are immune from collateral attack, that the lack of jurisdiction based on the extrinsic facts cannot be shown *aliunde;* in fact, those courts have to the fullest extent and in the most sweeping manner brushed aside all attempts to re-open collaterally the judgment in any way, and have repeatedly

pointed out the distinction between a summary sale for taxes by an administrative officer and a sale under a tax judgment of a court of general jurisdiction. We need only cite some of the cases, and a reading thereof will demonstrate not only the accuracy of our statement, but the judicial trend.

Allen vs. Ray, 10 S. W. 153; 96 Mo. 542 (1888).
Allen vs. McCabe, 93 Mo. 136 (1887).
Gibbs vs. Southern, 22 S. W. 713; 116 Mo. 204 1893).
Boyd vs. Ellis, 18 S. W. 29; 107 Mo. 394 (1891).
Hill vs. Sherwood, 8 S. W. 781; 96 Mo. 125 (1888).
State vs. Hunter, 11 S. W. 756; 72 Mo. 386 (1889).
Schmidt vs. Niemeyer, 13 S. W. 405; 100 Mo. 207 (1890).
Charley vs. Kelley, 25 S. W. 571; 120 Mo. 134 (1894).
Jones vs. Driskell, 7 S. W. 111; 94 Mo. 190 (1888).
Skillman vs. Manwaring, 73 S. W. 447; 173 Mo. 21 (1903).
South Missouri Co. vs. Carroll, 164 S. W. 599; 255 Mo. 357 (1914).
Skillman vs. Clardy, 165 S. W. 1050; 256 Mo. 297 (1914).

That such is the rule of the Federal Courts has been demonstrated, *supra.*

Even if the tax on the Alto mines was clearly illegal, or unconstitutional, and they were not taxable at all,

the judgment cannot be attacked collaterally, as the plaintiffs herein refused their day in court. See cases previously cited; also:

Mayo vs. Ah Loy, 32 Calif. 477; 91 Am. Dec. 595.
Mayo vs. Foley, 40 Calif. 281.
Chicago Seminary vs. Gage, 12 Fed. 398, 401.
Burcham vs. Terry, 13 S. W. 458; 55 Ark. 398.

The tax judgment is even conclusive between the parties and their respective successors in interest that the land was private, assessable and salable land, and not public property (*Warlain vs. New Orleans*, 177 U. S. 390; *Hewes vs. Miller*, 98 Atl. 776, 254 Pa. 957).

THE PLAINTIFFS HAVE NO STANDING TO QUESTION IN ANY WAY THE VALIDITY OF THE ALTO TAXES OR THE TAX JUDGMENT AND SALE, AS THEY HAVE NOT COMPLIED WITH THE PROVISIONS OF A CONDITION PRECEDENT IMPOSED BY THE LAW OF ARIZONA, BINDING ON THIS COURT AS A RULE OF DECISION.

Section 4939 of the Arizona Civil Code of 1913, so far as material, reads as follows:

> "No person * * * upon which a tax shall have been imposed under any provision of law relating to taxation of real or personal property shall be permitted for any reason to test the validity thereof, either as plaintiff or defendant, unless the amount of such taxes shall first have been paid to

> the county treasurer whose duty it is to collect the same * * * but after payment action may be maintained to recover any tax illegally collected * * *.

Such statute is binding upon a Federal Court. (*Wilfong vs. Ontario Land Co.,* 171 Fed. 51, 53, 54, and cases cited, U. S. C. C. A., 9th Circuit; U. S. R. S. §721, U. S. Comp. Stat. 1916 and 1918 Eds. §1538. Defendant in its amended answer pleads plaintiff's non-compliance with that statute.

Certainly there can be no question of the application of that statute, and the legislative policy which it expresses, when the contest is made as plaintiff and collaterally. The taxes on the Alto property are, therefore incontestable herein, irrespective of *res adjudicata.*

III

Sheriff's Deed Conveyed Fee Simple Title

THE TAX JUDGMENT ADJUDICATED THAT A FEE SIMPLE TITLE WOULD PASS ON THE SALE THEREUNDER, AND SUCH A TITLE ACTUALLY DID AND COULD PASS ON THE SALE.

Right to sell

The sale of the Alto property as patented mines was good. The judgment adjudicated that they are patented, and they are certainly not owned by the United

States and have not been since 1864. By their sale for taxes as patented mines, the ownership of the fee passed. (*Earhart vs. Powers,* 17 Ariz. 55, 57, 148 Pac. 286; *Forbes vs. Gracey*, 94 U. S. 762, 766).

On such a sale, every interest of the defendant in the mining property passes. (*Elder vs. Wood,* 208 U. S. 226; *Witherspoon vs. Duncan,* 4 Wall. 210; *N. P. R. R. Co. vs. Patterson,* 154 U. S. 130, 134).

Even if something remained to be done by the United States, or even if legal title were still in the United States, the tax sale passed the present or subsequent legal fee, as has been repeatedly held in tax cases (See tax cases cited in Point I, particularly *Burcham vs. Terry,* 18 S. W. 458, 55 Ark. 396; *Leibes vs. Steffy,* 4 Ariz. 10, 77 Pac. 617; *Elder vs. Wood,* 208 U. S. 226; *Witherspoon vs. Duncan,* 4 Wall 210). In the last mentioned case, on all fours with that at bar, a summary tax sale against the holder of a void entry, passed the fee even as against the subsequent rightful patentee, in a grant case very similar to Baca Float No. 3.

Assessment

The assessment was of "patented mines" as "real estate," which clearly was intended against the legal fee simple title thereto and the land covered thereby (*Earhart vs. Powers,* 17 Ariz. 55, 57, 148 Pac 286; *Forbes vs. Gracey,* 94 U. S. 762, 766).

Sale could only be of real estate

The Arizona Act of 1903 permitted a tax suit only for taxes on real estate; that proves real estate was intended to be sold and title of owners to real estate to be foreclosed.

Pleadings in tax suit

The petition or complaint in the tax case stated:

"2. Plaintiff further alleges that the *defendants herein* are the *owners* of the following described *tracts of land* situated in the County of Santa Cruz and State of Arizona, to-wit: The following patented mining claims" * * * (Tr. p. 31).

"That all the above described *tracts of land* were for each of the years and for the several purposes, and to the amounts hereinafter set forth, *subject to taxation* under the laws of the former Territory of Arizona." (Tr. p. 33.)

"3. That the Assessor * * * did proceed to list and assess the full cash value for taxation of said *tracts of land* * * * and under and by virtue of the laws of the then said Territory * * * the duly elected, qualified and acting officers * * * did * * * levy *upon said real estate* * * * certain * * * taxes on the separate *tracts* of said *real estate* * * * patented mines known as 'The Alto Group,' * * * all of which will appear from a tax bill hereto annexed" (At that time an unpatented

mining claim was not taxable as real estate under Arizona law) (Tr. p. 33).

"4. That all of said taxes * * * against said above described *tracts of land* * * * remain due and unpaid."

5 Mentions *"the above described tracts of land"* and repeatedly speaks of the *"real estate aforesaid"* and *"the land"* and *"the above described tracts"* and insertion of the names of the *"owners"* of said *"tracts"* in the tax records. (Tr. p. 42.)

6. Speaks of an endeavor to collect taxes *"against said real estate."* (Tr. p. 45.)

7. Penalties are mentioned for non-payment of the taxes *"upon the said several tracts of land."* "That all of *said tracts of land*" were returned delinquent. (Tr. p. 46.)

8. Alleges that under the laws of Arizona *"all* taxes assessed and levied upon each of said respective *tracts of real estate* * * * became and are a *first and paramount lien* * * * on each of the said *tracts* respectively * * * said *lien* upon said *real estate* * * * is retained in favor of said State * * * to *enforce said lien* by suit. (Tr. p. 46.)

9. Alleges employment of attorney.

"Wherefore * * * *the State of Arizona* * * * prays judgment * * * against said defendants

> and that (the taxes) be declared *a first and paramount lien* in favor of the State of Arizona and *all equities of redemption foreclosed* * * * that said *lien* be *enforced* and said *real estate* * * * be *sold*." (Tr. p. 48.)

Annexed thereto are copies of the back tax bills against "*Patented mines known as Alto Group*," with separate assessments, under "*real estate*." (Tr. p. 37-40.)

By not answering, each of the defendants therein (including the plaintiffs herein) admitted each and every allegation of fact in the petition.

Judgment

The judgment adjudicates taxes due "upon the following *patented mines*, * * * United States patents for all of said last mentioned mining claims being of record in the County Recorder's Office of Santa Cruz County." (Tr. p. 88.) And the Court which rendered the judgment must be deemed to have known that real estate was to be sold and a title in fee to pass, as such a suit under the law could apply only to real estate. That is a necessary part of the decision.

And the taxes were adjudged "a valid lien on the mine (real estate) (*Forbes vs. Gracey*, 94 U. S. 762, 766).

Sale

And the advertisement of sale was of "*patented*

mines" (fee simple real estate); and so was the sheriff's deed.

Effect of Judgment

The State brought suit to foreclose a lien upon fee simple real estate and to sell it, and got judgment therefor. What the State prayed for, it received, and on the judgment it received, the Sheriff sold, and the defendant herein bought, without objection by the plaintiffs, who were represented at the sale. (Tr. p. 204, f. 152.)

Effect of Statute

And the defendants in the tax suit and the attorney for the plaintiffs herein, present at the sale, must have known that under Section 89 of the Arizona Act of 1903, the Sheriff would

> "execute to the purchasers of *real estate* sold * * * a deed for the property so sold * * * which shall convey a *title in fee* to such purchaser of the *real estate* therein named, and shall be *conclusive evidence of* title and that the matter and things therein stated are true."

He and his clients must be deemed to have known the curative provisions of Section 105 of that Act, and the further fact that the law permitted collection only of real estate taxes by such a suit,and that by entering the judgment, the court had adjudicated that a fee title would pass.

If the judgment foreclosed the interest or title of any defendant therein, it forclosed against all

The plaintiff's contention herein is simply the paradox that there was no attempt to sell their fee title, although the petition or complaint prayed therfor and the judgment so decreed.

Why were they made defendants in the tax suit, except to bar them? Can a defendant in a mortgage foreclosure decree subsequently say collaterally, that there was no intention to bar his title or claim?

Sale was of well-known mines by name

The sale was of a well-known group of mines, known by name and general location through this part of Arizona. The slightest inquiry would have demonstrated they were on the Float. If the attorney for the plaintiffs herein had not known where the mines are, why did he attend the sale?

The plat of the Contzen survey, printed in the record of *Lane vs. Watts*, shows the Alto property within the boundaries of the Float. That map was as familiar as the alphabet to all the parties in interest and their attorneys.

There certainly is such a property as the "Alto Group of Mines," well known as such, and as mines, and the State sold the lands which bore that name.

For purposes of description by metes and bounds, reference was made to the recorded instruments, a not unusual form of conveyancing. Whether these instruments were good or bad, they certainly by reference furnished a proper specific real estate description.

The description of the property sold in *Ontario Land Co. vs. Yordy,* 212 U. S. 152, giving arbitrary block and lot numbers, was held good *"as a means of identification,* * * * liberally construed to afford the basis of a valid grant," though that could be done only by inferences, in order to make a "valid grant" at a tax sale. Are we not entitled to the same measure of judicial protection?

If the "John Doe Building" is ordered sold under a decree, with a reference to a recorded instrument of one who had no title, for specific metes and bounds, does not a good title pass to the metes and bounds specified in that instrument, if any of the defendants in the decree had a good title to those metes and bounds?

Conclusion

The tax petition, judgment, advertisement of sale and Sheriff's deed clearly describe a fee simple title to land, and the Alto Group of Mines actually constitute and did in fact constitute in 1913 *and* 1914 *an actual tract of non-Government land; and the conveyance thereof in the Sheriff's deed is sufficient and passed all the interest and title of all the plaintiffs herein thereto.*

IV

As to the Interest of the Heirs of Daisy Belle Bouldin

THE PLAINTIFFS HEREIN ARE NOT PERMITTED TO ATTACK COLLATERALLY THE SALE UNDER THE TAX JUDGMENT ON EVIDENCE ALIUNDE, AGAINST THE EXPRESS FINDING IN THAT JUDGMENT, THAT DAISY BELLE BOULDIN, ONE OF THE DEFENDANTS THEREIN, AND THEN OWNER OF RECORD OF AN UNDIVIDED ONE-HALF INTEREST IN THEIR CHAIN OF TITLE, DIED BEFORE THE TAX SUIT WAS INSTITUTED; AND PLAINTIFFS HAVE WAIVED ANY OBJECTION TO ANY SUCH DEFECT OR IRREGULARITY, AND ARE CLEARLY ESTOPPED FROM SO CONTENDING HEREIN.

Tax suit properly brought against owners of record

The Ariozna statute required that the suit be brought against the "Owners" of the land, copying the Missouri statute. That meant the owners of record, and the Bouldin title then stood of record in the names of James E. Bouldin and Daisy Belle Bouldin.

Vance vs. Corrigan, 78 Mo. 94, 97, 98.
Payne vs. Lott, 90 Mo. 676, 680, 691.
Cowell vs. Gray, 85 Mo. 169.
Allen vs. Ray, 10 S. W. 153, 96 Mo. 542.

Effect of Recital in Judgment

The judgment in the tax case recites proper service &c. on Daisy Belle Bouldin. (Tr. p. 87.)

The Arizona rule as to the effect of a judgment and its recitals seems to be as laid down in *Bryan vs. Kales*, 3 Ariz. 423, 426; 31 Pac. 517:

> "It is settled doctrine that a domestic judgment of a court of record, unless directly impeached, imports absolute verity as to every jurisdictional fact of which the record speaks, and is clothed in the conclusive presumption that every jurisdictional fact exists of which the record is silent."

As the Arizona judgment is being attacked collaterally in an Arizona Federal Court, the Arizona rule will be followed, particularly as the judgment is not *in personam* and the parties are within the same territorial jurisdiction. As the United States Supreme Court said in Hibben vs. Smith, 191 U. S. 310, 324, 325:

> "A state court has the right to place its own construction on its own judgments, and where, as in a case like this, it holds that the judgment is not void and that it cannot be attacked collaterally, we ought to follow that determination."

To the same effect is *Jetter vs. Hewitt*, 22 How. 352, 364.

The rule in many of the states allowing collateral atttack *against the recitals in the judgment as to juris-*

diction, is with respect to its *obligatory extraterritorial effect.* (*Thompson vs. Whitman,* 18 Wall. 457, 468.) This is best illustrated by the divorce cases where service is made by publication in a state other than the domicile of the defendant or the last matrimonial domicile. In such cases, other states need not recognize the decree, but most of them *through comity* do so. The comity rule is particularly applicable in this case.

Purchaser under Judgment has benefit of recitals

A purchaser at a judicial sale is not bound to look further back than the judgment of sale, if the facts necessary to give the court jurisdiction appear on the face of the proceedings. (*Thompson vs. Tolsic,* 2 Pet. 157, 168; *Davis vs. Guinea,* 104 U. S. 386, 391, 392; *Simmons vs. Saul,* 138 U. S. 439, 454, 455; *Florentine vs. Barton,* 2 Wall. 210, 217.)

Authorities on effect of death before suit

The United States Supreme Court has held, (*New Orleans vs. Gaines,* 138 U. S. 595, 611, 612), that a judgment against one who died five years prior thereto, *for rent accruing after his decease,* is not void, on collateral attack, particularly where, as at bar, the real parties in interest acquiesced therein. That is the rule in the Federal Courts, and decisive herein.

The best reasoned state court cases, particularly in actions in res or quasi in res, hold that a judgment

against one of several defendants, who died before the suit, is not void collaterally, in whole or in part, and the best text book on the subject so holds.

Van Fleet on Collateral Attack, §§587, 602, 603.
Collins vs. Mitchell, 5 Fla. 364, 367, 372.
Taylor vs. Snow, 47 Tex. 462, 468; 26 Am. Rep. 311.
Trail vs. Snoufler, 6 Md. 308, 314.
Wilcher vs. Robertson, 78 Va. 602.
Waterhouse vs. Cousins, 40 Me. 333.
Otis vs. Dencer, 116 Ind. 531; 19 N. E. 317.
Warder vs. Tainter, 4 Watts (Pa.) 270.
Carr vs. Townsend, 63 Pa. 202.
Murray vs. Weigle, 112 Pa. 159; 11 Atl. 781.
Yaple vs. Titus, 41 Pa. 195.
Watt vs. Brockover, 35 W. Va. 323; 13 S. E. 1007.

The reason of the rule is that the judgment, even though rendered on service by publication, is an adjudication that the defendant was alive at that time; from *Bryan vs. Kales, supra,* that would seem to be the Arizona rule. Perhaps the most practical explanation is that given by a Utah Court (40 Pac. 715), that the representatives of the decedent should seasonably apply to the court rendering the judgment to have it vacated, instead of disregarding it entirely or seeking to attack it collaterally. In the case at bar the representatives of the decedent not only failed to open the judgment, but fully acquiesced therein.

VAN FLEET ON COLLATERAL ATTACK.

Chap. XIII. Jurisdiction taken over the party or person (after due appearance or service) by reason of a mistake of law or fact.

§587.

Scope of, and principle involved in. Chap. XIII.

"In the cases considered in this chapter, there was no want of power to grant the relief prayed for or given, and no want of service on the party or person, but the mistake was one of fact concerning his * * * death * * * or one of law in assuming to act where the record showed the existence of such a defect. On principle, the defects herein considered can never make the proceedings void. If the mistake is one of fact, the proceeding is invulnerable collaterally, because the record cannot be contradicted. Neither is the judgment void when the defect appears in the record. The court having power to grant the relief sought, there is no want of jurisdiction over the subject matter, and the party is before it; and the fact that the court is denied the right to proceed either for or against him, is a matter of convenience or expediency, which does not touch its power."

Dead person treated as living §602.

Principle Involved.

"Jurisdiction over the parties being shown by the record, any judgment for or against them is an implied finding that they are in life and legally competent to protect their rights. The recital usually is that the parties, either in person or by attorney, are present, or neglect, after due notice, to be present. Those are matters to be determined from the evidence; and the determination is not void because the evidence was false or insufficient. As was well said by the Supreme Court of Maryland: 'The judgment concludes all persons from denying the fact of the party's existence at the time of its entry.' (*Trail vs. Snouffler,* 6 Md., 308, 314.) So where it was contended that the decree of a Virginia court against a non-resident upon service by publication, was void because he was dead before the suit was brought, the court said: 'The record is conclusively presumed to speak the truth, and can be tried only by inspection. This results from the power of the court to pass upon every question which arises in the cause, including the facts necessary to the exercise of its jurisdiction, and as to which, therefore, its judgment * * * is binding, until reversed, on every other court. * * * The defendant Martin was proceeded against as a person in being and as a non-resident of the state. An order of publication was accordingly made, and

duly and regularly executed. Its effect, therefore, is equivalent to an averment on the record that he had, in fact, been summoned—an averment which in this *collateral* proceeding, cannot be contradicted.' (*Wilcher vs. Robertson*, 78 Va. 602), and in Pennsylvania, where the contention was that a judgment entered on a warrant of attorney in favor of the payee of the note after his death, was void, the court said: 'No authority has been shown for the position taken in this case, that judgment taken or entered in favor of a deceased party is a nullity. Even a judgment against a deceased party is not so. * * * This was an *attempt to go behind the judgment.* This he could not do, as all the cases show. In fact, to have allowed it would have been to impugn the record, which imported that the judgment was in favor of a living party.' (*Carr vs. Townsend's Executors,* 63 Pa. 202).

§603.

Death of party before suit brought

Proceedings not void.

"In a proceeding in Indiana to establish a drain, constructive notice given to the record owner of land is sufficient to withstand a collateral attack, although he was then dead—the plaintiff being ignorant of the fact (*Otis vs. DeBoer,* 116 Ind.

531, 19 N. E. 317). Then follows discussion of *Jetter vs. Hewitt,* 22 How. 352). "The statute of Maine required notice to b served upon the creditor if *alive* and in the state. Where a debtor was discharged upon due return of service, it was held to be incompetent to prove collaterally that the creditor was *dead* before the notice was issued. (*Waterhouse vs. Cousins,* 40 Me. 353.) A judgment of revivor on a *scire facias* is not void because the defendant was dead when the writ was issued (*Warder vs. Tainter,* 4 Watts 270); nor is the foreclosure of a mortgage by *scire facias* on two returns of *nihil* void, because the mortgagor, a guardian, was dead when the suit was begun. (*Murray vs. Weigle,* 118 Pa. 159, 11 Atl. 781.) It was also decided in Texas that the death of the defendant (*Taylor vs. Snow,* 47 Tex. 462, 26 Am. Rep. 311) and in West Virginia that the death of the plaintiff (*Watt vs. Brookover*, 35 W. Va. 323, 13 S. E. 1007; *McMillan vs. Hickman,* W. Va. —, 14 S. E. 227, 231) before the suit was brought, did not make the judgment void."

In §604, the author mentions the contrary cases in Missouri, South Carolina, Massachusetts and an English case, but with disapproval.

Any Missouri case to the contrary is based on its general law, and not on its tax suit statute, and, therefore, such cases are not controlling in Arizona, partic-

ularly, as under §87 of the Arizona Act of 1903, matters of practice and procedure were specifically regulated by *Arizona general laws and statutes.*

This Federal Court, therefore, is bound by the United States Supreme Court decision in *New Orleans vs. Gaines, supra*, and *Hibben vs. Smith, supra,* as to the recognition of the general Arizona rule as to effect of the recitals in the judgment. There is apparently no Arizona authority directly in point as to the effect of the death of a defendant before suit.

Bar by Waiver and Estoppel and Lack of Tender of Purchase Price.

In its ultimate analysis, the case at bar resolves itself to the proposition: Can the heirs of one of the defendants in a judgment rendered in favor of the State of Arizona by an Arizona court of competent general jurisdiction, in an action *quasi in rem* for Arizona taxes on Arizona land, avoid the judgment collaterally as to them, in the Arizona Federal Court, when the records of Arizona at the time of the suit and sale showed that such deceased defendant was the owner of their interest in the land, and they were represented by attorney at the tax sale(Tr. p. 204)and made no objection thereto or disclosure of the defect or irregularity, and made no attempt to open the judgment, or redeem from the sale, and have not offered or tendered to the purchaser the amount of the sale price or any part thereof?

Lack of payment or tender of purchase price.

Where, as at bar, plaintiffs seek to set aside or avoid a judicial sale, after the purchaser has fairly paid its money in extinguishment of the judgment, they must first pay or tender the purchase price (*Davis vs. Gaines*, 104 U. S. 386, 405). The plaintiffs herein have not done so, and defendant herein so pleads in its amended answer to the amended complaint. (Tr. p. 12.)

In *Williams vs. Hudson*, (6 S. W. 261, 93 Mo. 524), cited by plaintiffs in error, it appeared that a tax judgment and sale had been had against several defendants, one of whom had died prior to the suit. His heirs brought suit to remove the tax sale as a cloud on their title, but the court declined to do so, saying that *the sale was not void, but* simply did not cut off their right to redeem, and as they had not offered to redeem they could not recover. That decision in itself would seem to be decisive against the plaintiffs herein.

Particularly, would such payment or tender be necessary in the case at bar, as there would undoubtedly be no right of action in the defendant herein to recover from the State of Arizona a part of the purchase price on any partial failure of title; furthermore, the conduct of the plaintiffs herein at the sale was such as to permit the defendant herein to purchase, relying on the judgment, as it was bound to do.

Waiver and Acquiescence

"Where a party knows of any fact that might constitute an objection to the regularity of the sale, which could be remedied before the sale if made known, and fails to disclose that fact, he will not later be permitted to make such fact the basis of objections to the confirmation."

24 Cyc. 36.

Hewitt vs. Great Western Co., **230 Fed.** 394 399 (CCA 9th).

"It is among the elementary principles of the common law, that whoever would complain of the proceedings of a court must do it in such time as not to injure his adversary, by unnecessary delay in the assertion of his right. If he objects to the mode in which he is brought into court, he must do it before he submits to the process adopted. * * * So long as this judgment remains in force it is in itself conclusive of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute that judgment. * * * No rule can be more reasonable than that the person who complains of an injury done him, should avail himself of his legal rights in a reasonable time."

Voorhees vs. U. G. Bank, 10 Pet. 447, 473, 474.

Asquiescense must be considered even though not constituting a technical estoppel; it guards purchasers at

judicial sales from astute afterthoughts (*Simmons vs. Burlington Ry. Co.*, 169 U. S. 278, 291), especially as under a recent Federal statute (Judicial Code §2748, as added by Act of March 3, 1915) an equitable defense can be interposed in a common law action.

Under Sections 592 to 595 of the Arizona Civil Code of 1913, and Sections 1480 to 1483 of its Civil Code of 1901, the plaintiffs herein had the right to apply to open the tax judgment, rendered on the service by publication, either on the merits or if they objected to the judgment *quasi in rem* against the interest of the heirs of Daisy Belle Bouldin in an action in which she, and not they, were made defendants, and prevent a sale which, under Section 89 of the Arizona Act of 1903, would pass the fee and furnish "conclusive evidence of title." This they could have done in ample time before the sale, and they had full opportunity to do so. Instead, they elected to attend the sale by attorney, without objection or disclosure. Clearly, they thereby acquiesced in the sale and waived any objections thereto or to the prior proceedings. They are also estopped on the well-known and common sense rule applied particularly at judicial sales, against one who stands by and allows his property to be sold without objection or protest against any irregularity or defect, or disclosure of any secret defense.

Estoppel in Pais

"One who stands by, while a sale is being made

> of the property in which he has an interest, and makes no claim thereto, * * * is held to be estopped from setting up such claims." This applies to judicial and execution sales.

Gill vs. U. S., 160 U. S. 426, 430.
Kirk vs. Hamilton, 102 U. S. 68, 75, 76, 78, 79.
Gregg vs. Von Puhl, 1 Wall. 274, 281.
Clegg vs. Greenwood Cemetery, 107 U. S. 466, 477.
Erwin vs. Lowry, 7 How. 172, 183.

The defense of equitable estoppel is available at law to a defendant in ejectment, as legal title passes by such estoppel.

Kirk vs. Hamilton, 102 U. S. 68, 76, 78.
Drexel vs. Barney, 122 U .S. 241, 253.
Dickerson vs. Colgrove, 100 U. S. 578.
George vs. Tate, 102 U. S. 564, 570.

One who stands by and without protest allows his property to be sold at a void judicial sale, without raising any question as to the validity of the sale, and allows the purchaser to expend money in reliance on the sale, is estopped from contesting its validity, and judgment in ejectment will be against him who stood by; the good faith of such a purchaser is assumed in the absence of evidence to the contrary. (*Kirk vs. Hamilton,* 102 U. S. 68, 75, 76, 78, 79.)

The doctrine of *Dickerson vs. Colgrove,* 100 U. S. 580, and *Kirk vs. Hamilton,* 102 U. S. 68, has been followed and approved in Arizona.

Bryan vs. Pinney, 3 Ariz. 412, 421; 31 Pac. 548.
Dalton vs. Renteria, 2 Ariz. 275, 280; 15 Pac. 38.

Such estoppels run with the land; and the parties and those claiming under them, and even the courts, are bound thereby (*Porterfield vs. Clark,* 2 How. 76, 109.)

Estoppel in pais is even applied against an owner or his vendee, when a railroad company has been permitted without objection to build its railroad, although having no right on the particular land at the time; in such a case, the owner, as well as the vendee, are estopped to maintain ejectment or trespass to try title and are remitted to an action for damages. (*Roberts vs. S. P. R. R. Co.,* 158 U. S. 1, 11; *Donohue vs. El Paso & S. W. R. R. Co.,* 214 U. S. 499.)

Actual knowledge and "standing by" at a tax sale, without making any objection thereto, strongly impressed the United States Supreme Court in a tax sale case, as will appear from the statement of facts preceding the opinion of the Court. (*Ontario Land Co. vs. Yordy*, 212 U. S. 152.)

Analysis of Interests of Plaintiffs

At any rate, the judgment is against "Jane Doe Bouldin," who is or can be the plaintiff, Helen Lee Bouldin; and when the plaintiff, Weldon Bailey, Esq., got his deeds from the other plaintiffs herein it must be presumed that he took whatever interest (if any) he did take in the Alto property from the plaintiff, David

W. Bouldin, who was the only grantor who could possibly have anything to convey in the Alto property.

Furthermore, the tax judgment and sale clearly barred the community share of James E. Bouldin in the one-half interest of his wife, Daisy Belle Bouldin, on her death.

Helen Lee Bouldin's interest is clearly barred by the judgment, and so is that of James E. Bouldin.

Whatever title was attempted to be conveyed to Mr. Bailey was to a grantee with notice, who was personally present at the sale, and *personally estopped*, so there is clearly neither title nor moral equity in the plaintiffs.

V.

Answers to Various Minor Contentions

"The execution does not state the amount due for taxes and interest upon each of the claims." But the judgment, to which it refers, does make such itemization and that is all the statute required. (Assg. of E. 3 (a).)

While the notice of sale did not set forth a similar itemization (and it would be most extraordinary if it had) the judgment therein referred to contains proper itemization.

Assg. of E. 3 (b). The statute required the *judgment* to contain the itemization but not the execution;

which referred to the judgment. Besides, the sheriff usually receives a certified copy of the judgment or at least is bound to take notice of all its provisions.

"It is the well known and established rule of law in Missouri and elsewhere, that a judicial sale and title acquired under the proceedings of a court of competent jurisdiction cannot be questioned collaterally, except in case of fraud, in which the purchaser is a participant." So held where land was sold while execution stayed. (*Griffith vs. Bogert,* 59 U. S. 158.)

A judicial sale cannot be objected to because the property was sold in bulk and not in parcels, where the Sheriff first offered it separately and received no bids, and then offered and sold it en masse. (*White vs. Crow,* 110 U. S. 183.)

A sale en masse is irregular and not void and cannot be attacked collaterally.

Lewis vs. Whitten, 20 S. W. 617, 619 (Mo.).

Norman vs. Eastburn, 130 S. W. 276, 281 (Mo.).

A sale after the return day on a levy made prior thereto is good. "On this point the court can only express its surprise that any doubt could be entertained."

Wheaton vs. Sexton, 4 Wheat. 502.

Webster vs. Woolbridge, 29 Fed. Cases No. 17340 (a Mo. Statute).

Remington vs. Lenthicum, 14 Pet. 84, 92.

U. S. vs. Hogg, 112 Fed. 909, 910; C. C. A. 6th Ct., Lurton, J.

Hensen vs. Peter, 164 Pac. 512.

Mason vs. Bennett, 52 Fed. 343, 344.

This is particularly true when the judgment ordered the sale of specific property (*Lumber Co. vs. Hotel Co.,* 29 P. 627; 94 Calif. 217).

The judgment debtor may by parol or silence, waive a provision for sale in parcels or any other irregularity.

Hudenoohl vs. Liberty Hill Co., 29 P. 1025 (Calif.) and cases cited.

17 Cyc. 1049.

17 Cyc. 1269.

24 Cyc. 36.

CONCLUSION

If ever equities for a defendant were present in a record they are in this case.

Not a dollar of the plaintiffs' money was ever spent on the Alto. What that property is, or rather was, represents the investment of other people.

At the tax sale, with the attorney for the plaintiffs herein standing by and making no protest or disclosure, at a sale advertised for fourteen consecutive weeks, under a judgment rendered over seven months prior thereto by the highest court of original jurisdiction of

the State of Arizona, in a suit brought by the sovereign State of Arizona, to enforce its sovereign right to collect taxes, at a time when Santa Cruz County sorely needed the money, the defendant herein, successor in a way to a heavy investor in the Alto companies, bought the property. Nineteen months thereafter it received its deed.

There has never been any direct attack on the tax judgment, nor even any attempt to open it and allow the plaintiffs herein to defend, although the sale took place over seven months after the judgment and the plaintiffs herein had not only constructive but full actual notice, and were represented by counsel at the sale.

When defendant asks judgment herein in its favor, it seeks not only what the law clearly gives it, but what every principle of justice and fair play demands.

Respectfully submitted,

BEN C. HILL,

Attorney for Defendant in Error.

APPENDIX

No. 92. AN ACT

To Amend Chapter VII of Title 62 of the Revised Statutes of Arizona, 1901, Entitled "Collection of Delinquent Taxes."

Be it Enacted by the Legislative Assembly of the Territory of Arizona:

Section 1. That Chapter VII of Title 62 of the Revised Statutes of Arizona, 1901, be and the same is hereby amended so that said Chapter shall read as follows:

Section 79. At the meeting of the County Board of Supervisors at which the several delinquent lists are required by law to be returned and certified, the said Board of Supervisors shall examine and compare the list of lands and town lots on which the taxes remain due and unpaid; and if any such lands or town lots have been assessed more than once, or if said lands or town lots are not subject to taxation, or if the legal subdivision be incorrectly described, in all such cases the said Board of Supervisors shall correct such error by the best means in their power and cause the lists so

corrected to be certified and filed in the office of the clerk of the Board of Supervisors, and shall also cause the amount of the Territorial and county taxes to be certified to the Auditor of the Territory.

Section 80. All real estate upon which the taxes remain unpaid on the second Monday in December, annually, shall be deemed delinquent, and the tax collector shall proceed to enforce the lien of the Territory thereon, as required by this chapter, and any failure to properly return the delinquent list, as required by this chapter, shall in no way affect the validity of the assessment and levy of taxes nor of the judgment and sale by which the collection of the same may be enforced, nor in any manner to affect the lien of the Territory nor on such delinquent real estate for the taxes unpaid thereon.

Section 81. The clerk of the Board of Supervisors shall file the said lists in his office and within ten days thereafter make the same into a "back tax book," as contemplated by Section 84, under the seal of the Board of Supervisors, and deliver the same to the tax collector of his county, whose duty it shall be to proceed to collect the same, and to that end shall have the power, and it is hereby made his duty, to levy upon, seize and distrain personal property and sell the same for such taxes. And if it appears that any Board of Supervisors, or clerk of such board, of this Territory has, within five

years next before the taking effect of this section, failed in the discharge of the duties prescribed by Sections 79 and 84 of this chapter, or shall so fail at any time hereafter, to such an extent that the collection of said taxes cannot be enforced by law, it shall be the duty of said Board of Supervisors and said clerk, or their successors in office, immediately after such omission or defect is discovered, to proceed at once to correct the same and supply the omission or defect and return such corrected "back tax book" to the collector, whose duty it shall be to collect the same, as hereinbefore and hereinafter set forth.

Section 82. The taxes due and unpaid on any real estate which has heretofore been returned delinquent and which has not feen forfeited to the Territory, and the taxes due and unpaid on any real estate which has been forfeited to the Territory for the non-payment of such taxes, shall be deemed and held to be back taxes, and the lien theretofore created in favor of the Territory of Airzona is hereby retained on each such tract and lot of real estate to the amount of the taxes due thereon and also the interest and costs accruing under this chapter.

Section 83. Immediately after the taking effect of this chapter, the tax collector of each county shall return to the Board of Supervisors of his county, all delinquent and forfeited lists of tax bills of real estate

in his hands, except taxes due prior to the year 1888, which taxes the clerk of the Board of Supervisors is hereby authorized to strike from the forfeited list, marking thereon all collections made, and shall at the next regular meeting of the Board of Supervisors make settlements for such collections.

Section 84. Within sixty days after the taking effect of this chapter, and every year thereafter, within thirty days after the settlement of the tax collector, the several clerks of the County Boards of Supervisors in each county in this Territory, shall make in a book to be called the "back tax book," a correct list in numerical order of all tracts of land and town lots on which back taxes shall be due in such county, city or town, setting forth opposite each tract of land or town lot the name of the owner, if known, and if the owner thereof be not known, then to whom the same was last assessed, the description, supervisor of his county, all delinquent and forfeited lists of tax bills, of real estate in his hands, except taxes due prior to the year 1888, which taxes the clerk of the Board of Supervisors is hereby authorized to strike from the forfeited list, marking thereon all collections made, and shall at the next regular meeting of the Board of Supervisors make settlements for such collections.

Section 84. Within sixty days after the taking effect of this chapter, and every year thereafter, within thirty

days after the settlement of the tax collector, the several clerks of the County Boards of Supervisors in each county in this Territory shall make in a book to be called the "back tax book" a correct list in numerical order of all tracts of land and town lots on which back taxes shall be due in such county, city or town, setting forth opposite each tract of land or town lot the name of the owner, if known, and if the owner thereof be not known, then to whom the same was last assessed, the description thereof, the year or years for which such tract of land or town lot is delinquent or forfeited and the amount of the original tax due each fund on said real estate (and the interest due on the whole of said tax, at the time of making said "back tax book," together with the clerk fees then due) in appropriate columns arranged therefor and the aggregate amount of taxes, interests and clerk fees charged against each tract of land or town lot for all the years for which the same is delinquent or forfeited. Said "back tax book" when completed shall be delivered by the said clerk to the tax collector of the county, for which he shall take duplicate receipts, one of which he shall file in his office and the other with the Auditor of the Territory, and the clerk of the Board of Supervisors shall charge such tax collector with the aggregate amount of taxes, interest and clerk fees contained in said "back tax book." All taxes, interest and clerks' fees hereinafter contained in the "back tax book" herein described, shall bear interest from the time of making out said "back tax

book" at the rate of ten per cent per annum until paid. In computing interest under this chapter, a fraction of a month shall be counted as a whole month.

Section 85. The tax collectors of the respective counties shall proceed to collect the taxes contained in such "back tax book" as herein required, and any person interested in, or the owner of any land or town lot contained in said "back tax book" may, on or before the 31st day of December, A. D. 1903, redeem such tract of land or town lot, or any part thereof, from the Territory's lien thereon, by paying to the tax collector the amount of the original taxes, as charged against such tract of land or town lot or any part thereof, from the Territories in lien thereon, by paying to the tax collector the amount of the original taxes, as charged against such tracts of land or town lots described in said "back tax book," together with interest in the same from the 1st day of January, A. D. 1901, at the rate of ten per cent per annum, and the costs accruing under this chapter; provided, that if suit shall have been commenced against any person owing taxes on any tract of land or town lot contained in said "back tax book" for the collection of taxes due on the same, the person desiring to redeem any such tract of land or town lot shall, in addition to the original tax and the interest, and costs accruing under this chapter, pay all necessary costs incurred in the court where the said suit is pend-

ing, together with such attorney's fees as the Court may allow.

Section 86. If on the 1st day of January, A. D. 1904, any of said lands or town lots contained in said "back tax book" remain unredeemed, it shall be the duty of the tax collector to proceed to enforce the payment of the taxes charged against such tract or lot by suit in the courts of competent jurisdiction of the county where the real estate is situated, which same court shall have jurisdiction without regard to the amount sued for, to enforce the lien of the Territory, and for the purpose of prosecuting suit for taxes under this chapter the collector shall have power, with the approval of the County Board of Supervisors, to employ such counsel as he may deem necessary, who shall receive as fees in any suit such sum, not to exceed twenty-five per cent of the amount of the tax actually collected and paid into the treasury, as may be agreed upon in writing and approved by the County Board of Supervisors before such services are rendered, which sum shall be taxed as costs in the suit and collected as other costs, and no such attorney shall receive any fee or compensation for such service except as in this section provided, and it shall be the duty of the tax collector when suit shall have been commenced against any tract of land or town lot in said "back tax book" to note opposite said tract of land or town lot such fact, also against whom suit has been commenced.

Section 87. All actions commenced under the pro-

visions of this chapter shall be prosecuted in the name of the Territory of Arizona, at the relation and to the use of the tax collector, and against the owners of the property; and all lands owned by the same person may be included in one petition and in one count thereof, for the taxes for all such years as taxes may be due thereon, and the said petition shall show the different years for which taxes are due, as well as the several kinds of taxes or funds to which they are due, with the respective amounts due to each fund, all of which shall be set forth in a tax bill of said back taxes, duly authenticated by certificate of the tax collector and filed with the petition, and said tax or bills, so certified, shall be prima facie evidence that the amount claimed in said suit is just and correct, and all notices and process in suit under this chapter shall be sued out and served in the same manner as in civil actions in district courts, and in case of suit against non-residents, unknown parties, or other owners on whom service cannot be had by ordinary summons, the proceedings shall be the same as now provided by law in civil actions affecting real or personal property. In all suits under this chapter, the general laws of this Territory as to practice and proceedings in civil cases shall apply so far as practicable and not contrary to this chapter.

Section 88. The judgment, if against the defendant, shall describe the land upon which the taxes are found to be due, shall state the amount of taxes and interest

found to be due upon each tract or lot, and the year or years for which the same are due, up to the rendition thereof, and shall decree that the lien of the Territory be enforced, and that the real estate, or so much thereof as may be necessary to satisfy such judgment, interest and costs, be sold, and execution shall be issued thereon, which shall be executed as in other cases of judgment and execution, and said judgment shall be a first lien upon said land.

The clerk of the district court shall, upon application of the tax collector or attorney, issue the execution herein provided for, describing the real estate named in the judgment, and directed to the sheriff, and commanding him to levy upon, advertise and sell said property, or so much thereof as may be necessary to pay said judgment and subsequent costs, the same as sheriffs might do under ordinary execution.

Section 89. The sheriff shall execute to the purchasers of real estate, sold under this chapter, a deed for the property so sold, which shall be acknowledged before some officer authorized by law to take acknowledgements of deeds, as in ordinary cases, and which shall convey a title in fee to such purchaser of the real estate therein named and shall be conclusive evidence of title and that the matter and things therein stated are true. In case any person shall be in possession of the real estate which may be sold as herein provided, the

district court or the judges thereof out of term time, upon application, shall cause a writ of possession to be issued, placing the purchasers of his assigns in possession.

Section 90. When real estate has been sold for taxes, costs or penalties by the sheriff of any county within the Territory of Arizona and the same sells for a greater amount than the taxes and all costs and penalties in the case, and the own or owners, agent or agents cannot be found, it shall be the duty of the sheriff of the county, when such sale has been made or may hereafter be made, to make a written statement describing each parcel or tract of land sold by him for a greater amount than the taxes and all costs and penalties in the case, and for which no owner or owners, agent or agents can be found, together with the amount of surplus money in each case, which statement shall be subscribed and sworn to by the sheriff, making the same before some officer competent to administer oaths in this Territory, and then presented to the County Board of Supervisors of the county where such sale has been made or may hereafter be made, and on the approval of the statement by the Board of Supervisors, the sheriff making the same shall pay the said surplus money into the county treasury, take the receipt in duplicate of said treasurer for said overplus of money, and retain one of said duplicate receipts and file the other with the County Board of Supervisors, and thereupon the clerk of the

Board of Supervisors shall charge said treasurer with said amount, and said treasurer shall place said money to the credit of the school fund of the county, to be held in trust for the term of ten years for the owner or owners or their legal representatives. And at the end of ten years, if such fund shall not be called for, then it shall become a permanent school fund of the county. County Boards of Supervisors shall compel owners or agents to make satisfactory proof of their claims before receiving their moneys; provided, that no county shall pay interest to the claimant of any such fund.

Section 91. Whenever it shall appear to any County Board of Supervisors that any tract of land or town lot contained in said "back tax book" is not worth the amount of taxes, interest, cost and penalties due thereon, as charged in said "back tax book," or that the same would not sell for the amount of said taxes, interest, cost and penalties, it shall be lawful for said Board of Supervisors to compromise said taxes with the owners of said tract of land or town lot, and upon payment to the tax collector of the amount agreed upon, a certificate of redemption shall be issued under the seal of the County Board of Supervisors, which shall have the effect to release said lands from the lien of the Territory and all taxes due thereon as charged on said "back tax book," and in case said Board of Supervisors shall compromise and accept a less amount than shall appear to be due on any tract of land or town lot as charged

on said "back tax book," it shall be the duty of the said Board of Supervisors to order the amount so paid to be distributed to the various funds to which said taxes are due, in proportion as the amount received bears to the whole amount charged against such tract or lot; provided, the County Board of Supervisors may order that no suit be brought on any specified tract, if, in the judgment of said Board of Supervisors, such tract is not worth or will not bring the taxes, interest and costs; and provided, further, that the County Board of Supervisors of any county may direct that any tax or fund, the validity of which is being tested in the courts, may be omitted from any suits brought under this chapter, but the judgment rendered in any action where such tax is omitted shall not bar or affect any subsequent action for such tax so omitted whenever the County Board of Supervisors may direct an action to be brought for such omitted tax.

Section 92. All suits instituted under the provisions of this chapter shall be tried at the return term of the summons, unless continued for good cause shown.

Section 93. Fees shall be allowed for services rendered under the provisions of this chapter as follows:

To the tax collector, four per cent of all sums collected, such per centum to be fixed as costs and collected from the party redeeming.

To the clerk of the County Board of Supervisors for making the "back tax book," twenty-five cents per tract or town lot, to be taxed as costs and collected from the party redeeming such tract or town lot.

To the district court clerk, sheriff and printer such fees as are allowed by law for like services in civil cases, which shall be taxed as costs in the case; provided, that in no case shall the Territory or county be liable for any such costs, nor shall the County Board of Supervisors or Territorial Auditor allow any claim for costs incurred by the provisions of this chapter.

Section 94. Any party interested in any tract of land or town lot may pay the taxes, interest and costs thereon after the commencement of suit, and before sale, by paying to the tax collector the amount of such taxes and interest, and by payment to the district court clerk of all costs thereon; and if execution has been issued the same may be paid to the sheriff, who shall forthwith pay such taxes and interest to the tax collector, and the costs to whom the same are due.

Section 95. The collector shall make diligent endeavor to collect all taxes upon said "back tax book," and whenever he finds that any taxes therein have been paid, he shall report that fact to the County Board of Supervisors, giving the name of the officer or person to whom such taxes were paid, and he shall also report to the Board of Supervisors all cases of double assess-

ment or other errors, and thereupon the Board of Supervisors shall cause the necessary action to be taken and entries to be made.

Section 96. All back taxes, of whatever kind, appearing due upon delinquent real estate, shall be extended in the "back tax book" made under this chapter, and collected by the tax collector under authority of this chapter.

Section 97. No action for recovery of taxes against real estate shall be commenced, had or maintained unless action therefor shall be commenced within five years after delinquency, excepting taxes now delinquent, on which suit may be commenced at any time within five years after this chapter shall take effect, but not thereafter.

Section 98. The sheriff may appoint the tax collector his deputy sheriff, and when so appointed he may serve all process in suits commenced under this chapter with like effect as the sheriff himself might do.

Section 99. Hereafter, as often as any delinquent tax list or tax bills shall be received by the Board of Supervisors from tax collectors at their annual settlements, the same shall be made by the clerk of the Board of Supervisors into a "back tax book" containing the same facts and in the same form as provided in Section 84, as to lands, city and town lots now delinquent, and said book shall be delivered to the tax collector. The

tax collector shall proceed to collect th taxes due thereon, but shall not bring suit thereon for sixty days after such taxes become delinquent, but thereafter he shall proceed with such delinquent taxes in all matters the same as provided in this chapter in reference to taxes now delinquent. All taxes hereafter becoming delinquent shall bear one per cent interest per month from the time they become delinquent until paid, and shall also be subject to the same fees, commissions and charges as in this chapter provided for taxes now delinquent, except that for making the same in the "back tax book" the clerk who makes such book shall receive only fifteen cents per tract, city or town lot. In computing interest under this section, a fraction of a month shall be counted as a whole month.

Section 100. Nothing in this chapter shall be so construed as to prevent the institution of suit before the times herein named, provided that if it be real estate in any county of this Territory, and the owner thereof is about to remove from such county, or, being a non-resident of such county, comes within the same, so that personal service can thereby be had upon him.

Section 101. Any person hereafter putting a tax deed on record in the proper county shall be deemed to have set up such a title to the land describd therein as shall enable the party claiming to own the same land to maintain an action for the recovery of the possession

thereof against grantee in deed, or any person claiming under him, whether such grantee or person is in actual possession of the land or not.

Section 102. Any failure to make or complete the "back tax book" within the time required herein, or any informality in making said "back tax book" shall in no way affect the validity of the same.

Section 103. The assessment book and all books, papers and records in the office of the clerk of the Board of Supervisors appertaining to the subject of taxation, or copies thereof, duly certified by such clerk, shall be evidence in all courts in all controversies concerning the validity of the sales of lands for taxes.

Section 104. In all advertisements, notices, lists, records, certificates, deeds or other papers required to be made by or under the provisions of this chapter, it shall be lawful to use letters, figures and characters as follows:

Letters may be used to denote townships, ranges, boundaries, parts of sections, parts of lots, blocks or other subdivisions of real estate in th following manner: T. for township, R. for range, L. for lot, B. for block, N. for north, E. for east, S. for south, W. for west, or any combination or combinations of the four last mentioned letters to denote parts of sections, lots, blocks or other subdivisions of real property.

Figures may be used as may be requisite to state any number required, whether it be township, range, survey, section, block, lot or part thereof, acres or fraction thereof, date of any kind, amount of taxes, interest or costs, or any other matter or thing which may be stated or given in figures. Characters such as ", " of the words "do" or "ditto" or "same" may be used to denote continuation of township, range, years, tax due or other dates, and when either shall be so used shall be deemed and held to denote the same as shall stand next above in the column in which any such character or word shall be so placed. Any and all descriptions of real estate made under the provisions of this chapter by the use of letters, figures and characters as provided in this section, when so made that the land or lot may be identified and located, shall be deemed and held to be good, valid and complete, as though the same had been written out in full. Dates of valuation and narration, taxes, interest, costs, acres or lots, or any fraction thereof, or any number or amount when stated in figures, letters or characters, as herein provided, shall be deemed and held to be fully and fairly stated, as though the same had been written out in full.

Section 105. No irregularity in the assessment roll, or omission from the same, or mere irregularity of any kind in any of the proceedings, shall invalidate any such proceeding or the title conveyed by the tax deed, nor shall any failure of any officer or officers to perform the

duties assigned him or them on the day or within the time specified, work any invalidation of any such proceedings, or of any such deed, and no overcharge as to a part of the taxes or costs, and payment of such taxes or costs, shall invalidate a sale for taxes, except as to a part of the real estate sold to the proportion of the whole thereof as such part of the taxes and costs is to the whole amount for which land was sold. Acts of officers de facto shall be valid as if they were officers de jure, and if a deed would be valid as to the sale for any one tax, it shall not be impaired by any irregularity, error in the proceeding, or sale for any other tax or taxes.

Section 2. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

Approved March 19th, 1903.